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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.


## PRIVY COUNCIL REPORT

### HIAP LEE (CHEONG LEONG AND SONS) BRICKMAKERS LTD. v. WENG LOK MINING COMPANY LTD.

**[P.C. (Lord Wilberforce, Lord Diplock, Lord Cross of Chelsea, Lord Kilbrandon and Sir Harry Gibbs) June 4, 1974]**
**[Privy Council Appeal No. 29 of 1972]**

*Tort — Nuisance — Unlawful interference with use or enjoyment of land — Escape of water from reservoir — Findings of facts by trial judge — Whether Federal Court entitled to set aside findings of facts — Negligence — Whether the rule in Rylands* v. *Fletcher*(2) *applicable.*

This was an appeal from the judgment of the Federal Court ([1972] 1 M.L.J. 156), which allowed an appeal by the respondents from the judgment of the High Court. The respondents had built a reservoir on their land and water had escaped and caused damage to the appellant's land. The learned trial judge held that the respondents were liable in negligence, under the rule in *Rylands* v. *Fletcher*(2) and in nuisance. On appeal the Federal Court held that the appellant's evidence failed to establish any of the liabilities alleged against the respondents and they allowed the appeal. The appellants were given leave to appeal against the decision of the Federal Court ([1972] 2 M.L.J. 67).

**Held,** allowing the appeal: (1) the Federal Court was wrong in setting aside the findings of facts arrived at by the learned trial judge;

(2) in the circumstances of this case the trial judge's finding of liability on the ground of negligence could not be supported;

(3) there was no evidence in this case to show whether or not the methods employed by the respondents were in any way unusual and it was not necessary to decide the point, whether in the light of local conditions the rule in *Rylands* v. *Fletcher*(2) applies to any escape of water accumulated on the miner's land for the purpose of tin mining or only to cases in which the methods employed could be regarded as unusual;

(4) on the facts the respondents were guilty of nuisance, that is to say of unlawful interference with the use or enjoyment by the appellants of their land.

*Cases referred to:-*

(1) *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43.
(2) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.
(3) *Richards* v. *Lothian* [1913] A.C. 263.
(4) *Read* v. *Lyons* [1947] A.C. 156.
(5) *Pacific Tin Consolidated Corporation* v. *Hoon Wee Thin* [1966] 2 M.L.J. 240 and [1967] 2 M.L.J. 35.
(6) *The Wagon Mound (No. 2)* [1967] 1 A.C. 617 at p. 639.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

*Eugene Cotran* and *Mrs. Shanta B. Menon* for the appellants.

*Robert Gatehouse Q.C.* and *Robert Alexander Q.C.* for the respondents.

**Lord Cross of Chelsea** (delivering the judgment of the Board): This is an appeal by Hiap Lee (Cheong Leong and Sons) Brickmakers Ltd. from an order of the Federal Court of Malaysia (Azmi L.P., Suffian and Ali F. JJ.) dated 31st December 1971 which allowed an appeal by the respondents Weng Lok Mining Company Ltd. from a judgment of Raja Azlan Shah J. given on the 19th March 1971. By that judgment the appellants had been awarded 3,000 dollars as general damages in respect of the flooding of their land in April 1965 by water which had escaped from land of the respondents and had been given the costs of the action.

The appellants were the owners and occupiers of Lot 3582 in the Mukim of Batu in the district of Kuala Lumpur upon which they carried on the business of brickmakers. A kiln and a building in which bricks were stored stood close to the western boundary of their lot. The respondents held a mining lease of Lot 4661 which lies immediately to the west of Lot 3582 where they carried on the business of tin mining. They used the hydraulic method — that is to say they took water from the river which was stored on the land in reservoirs and after being drawn off and used for mining purposes was returned to the reservoirs to be used again in due course. When in the course of circulation water is returned to the reservoir it is mixed with a considerable quantity of waste material and in consequence the level of the water tends to rise. Where necessary "bunds" of sand and clay are built to prevent the water from escaping and these bunds are raised when necessary from time to time. On the part of Lot 4661 adjacent to Lot 3582 there was a large pool or reservoir and a previous mining lessee had built a bund between Lot 4661 and Lot 4658 which lies immediately to the south of Lot 3582. That bund did not however extend northwards along the western boundary of Lot 3582.

In an action started by writ on 25th October 1965 the appellants alleged that in April 1965 a large quantity of water escaped from the respondents' land on to their land whereby they suffered serious damage. The relevant paragraphs in the statement of claim ran as follows:

"4. The plaintiffs' said land lie at the foot of a half completed bund on the defendant's land and the boundary between the plaintiffs' said land and the defendant's land.

5. The defendant at all material times maintained upon the land aforesaid by means of the half completed bund a reservoir of water of such size that if the said water escaped therefrom it was likely to injure the plaintiffs' land. The maintenance of the said reservoir constituted a non-natural use of the defendant's land.

6. On or about the end of April 1965 owing to the negligence of the defendant its servant or agents by not completing the bund, the half completed bund could no longer contain the reservoir of water and the aforesaid reservoir burst and the water therefrom escaped and damaged the plaintiff's land.

PARTICULARS OF NEGLIGENCE

a) Failed to complete the bund to contain the reservoir of water.
b) Failed to inspect and see that the discharge of water would not be in excess of the capacity of the reservoir.
c) Failed to guard against the breaking of the reservoir having the knowledge or means of knowledge that such a disaster might take place; regard being had to the condition of the bund at the material time.
d) The plaintiffs say that the principles of the doctrine of *'res ipsa loquitur'* apply to this case.

7. Further or alternatively the said reservoir was of such dimensions and the volume of water impounded therein was of such a volume that the said water if it escaped therefrom was likely to injure the plaintiffs' land. By reason of the escape of the said water aforementioned the defendant is liable as for a nuisance. Plaintiffs suffered damage. The defendant is also liable as for a nuisance."

The statement of claim went on to claim that the appellants had suffered special damage, chiefly by the loss of brickmaking earth, to the amount of 19,713 dollars and further included a claim for general damages. The defence consisted simply of a traverse of the allegations in the statement of claim. The action did not come on for trial until 1969, — when it was heard for nine days, six in April and three in July. As well as a considerable volume of oral evidence on each side the judge had before him plans of the area prepared by a surveyor called by the plaintiffs and three sets of photographs — two taken on behalf of the plaintiffs in May and December 1965 and one taken on behalf of the defendants in August 1965. He also inspected the area himself. By his judgment which was not given until nearly two years after the hearing he found that there had been an escape of water from the respondents' land which had caused damage to the appellants' land and that the respondents were liable (a) in negligence, (b) under the rule in *Rylands* v. *Fletcher* and (c) in nuisance. He went on to find that the appellants had failed to prove any of the special damage of which they had given particulars but he awarded them 3,000 dollars general damages and the whole costs of the action.

The case is one with which it is difficult for an appellate court to deal. The judgment does not paint a clear picture of what the judge thought had happened; it contains no analysis of the evidence; and it appears in places to reflect the allegations made in the statement of claim rather than anything which — to judge from the judge's notes which is all that an appellate court has to go upon — was said in evidence by any of the witnesses. Further it is difficult for anyone who did not hear the witnesses and visit the site to relate the plans to the photographs and form a clear mental picture of the area in question. So far as their Lordships can see on the material available to them the salient points are as follows. Mr. Curtis, the Senior Inspector of Mines, giving evidence for the respondents, said that when he visited their mine in January 1965 there was nothing to indicate any danger of an escape of water. The appellants' Factory Manager said that one day in March he found water to the depth of about a foot on a small area of their land. He reported this to the respondents' "kepala" who said that he would inform his superiors and have a "bund" built. About this time the respondents did in fact raise the height of the existing "bund" and begin to extend it northwards along what they then took to be the eastern boundary of their land. When the "bund" had been extended some 40 feet the appellants complained that the boundary between the two lots lay further to the west than the respondents had thought and that the "bund" was encroaching on their land. The respondents had a survey made which showed that the appellants were right and anticipating its result they began to build a second "bund" on their side of what was in fact eventually found to be the boundary. This bund, when completed, as it was in June, ran the whole way along the western boundary not only of Lot 4658 but also of the plaintiffs' Lot 3582. The new "bund" was made up of sand and slime which the respondents pumped — together with water — through a pipe which they lengthened from time to time as the work progressed. So far there was not much dispute as to the facts — though the respondents did not admit that they had been warned in March of the appearance of water on the appellants' land. The real issue of fact between the parties was whether or not there was a serious escape of water from the respondents' lot on to the appellants' land when the new bund was under construction but not yet completed. Three witnesses called for the appellants — their Managing Director, their Factory Manager, and a clerk in their employ — said that on some day, unspecified, towards the end of April a great quantity of water mixed with sand and mud which was being discharged from the pipe on the respondents' land, flowed on to part of the appellants' lot and covered the area where the kiln and the building in which bricks were stored stood to a depth of two to three feet. They complained to the respondents at once and the water quickly subsided leaving a deposit of mud and sand on the land in question. Further, the appellants' surveyor who made a survey of the area on 31st May and 1st June said that at that date there was still mud and sand and a certain amount of water on .616 of an acre forming part of Lot 3582. His plan showed that area, which he described as the "encroached area", and there was evidence that it included the site of the kiln and the building in which bricks were stored. The respondents, for their part, admitted that as a result of the mistake as to the position of the boundary their predecessors and they themselves had used a small part of Lot 3582 for the purpose of their business and that consequently until the new bund was completed some of "their" water had been on the appellants' land but they denied that there had been any such escape of water from Lot 4661 on to Lot 3582 in April as the plaintiffs' witnesses alleged. They called evidence to show that the pipe in question could not have discharged such a quantity of water as the appellants' witnesses testified to in the relevant space of time; they challenged the items of special damage claimed by the appellants; and submitted that they were only entitled to nominal damages for an unintentional trespass which had done them no harm. As has been said the judgment does not set out the rival contentions or analyse the evidence but there is no doubt what the judge found. He believed the appellants' witnesses as to the escape of water; he was not satisfied that they had

suffered any of the special damage which they alleged; but he thought that they were entitled to a sum by way of general damages which he fixed at 3,000 dollars. The respondents appealed against the judgment to the Federal Court which allowed the appeal and set aside the judge's order. That court thought that the judge could not properly accept the evidence of the appellants' witnesses as to the cause of the escape of water if he was not prepared to accept their evidence as to the special damage and said that if one disregarded the evidence of the appellants' witnesses "the possibility or probability of the flood being caused by water flowing from other places or directions cannot be disregarded." The amount of damages awarded was too small to give the appellants a right to appeal to this Board but by a judgment given by Ong C.J. on 25 May 1972 the Federal Court, differently constituted, gave them leave to appeal.

As their Lordships have indicated the judgment of the trial judge was open to criticism on various grounds but they have no doubt that the Federal Court was wrong to set aside the findings of fact at which he arrived. He had to decide whether, on the balance of probability, to accept as truthful the evidence which the appellants' witnesses gave as to the flooding of their land. He saw and heard those witnesses and, as Lord Diplock said in the passage in the judgment of the Board in *Collector of Land Revenue* v. *Alagappa Chettiar*[1] which is quoted in the judgment of the Federal Court giving leave to appeal in this case, it is only in very exceptional circumstances that an appellate court can be justified in refusing to accept the trial judge's findings of primary fact which are dependent on the credibility of oral evidence of witnesses whom he has seen and heard and the appellate court has not. There may, of course, be exceptional cases — as, for example, when the oral evidence which the judge has accepted is wholly inconsistent with some piece of unimpeachable documentary evidence which the judge has overlooked or the importance of which he has failed to appreciate. But there were no exceptional circumstances here. The fact that the judge held that the appellants had failed to establish any of the special damage which they claimed, saying that the claims "were characterised by the poor quality of evidence tendered and the general lack of proof" was no doubt a circumstance which might have led him to view the evidence which the plaintiffs' witnesses gave as to the flooding with some reserve; but there was not — as the Federal Court seems to have thought — any radical inconsistency in his being satisfied that they were telling the truth as to the flooding — corroborated as their evidence was by that of the surveyor — but not being satisfied with regard to the claims for special damage resulting from the flooding. Moreover the suggestion thrown out by the Federal Court that the flood might have been caused by water flowing from some place other than the respondents' land was unsupported by a shred of evidence. It was common ground between the parties that some water used by the respondents in their mining operations was on the appellants' land and no one suggested that such water as was there had come from anywhere else than the respondents' land. The dispute was as to how much water was there and how it had got there — the respondents admitting that owing to the mistake as to the boundary a little of their water was at all relevant times on the appellants' land but that its presence had done them no harm and that they were only entitled to nominal damages while the appellants were saying that a great quantity of water had escaped on to their land and done them serious damage.

Their Lordships turn now to consider the three heads under each of which the judge held that the respondents were liable in law to the appellants for any damage which they had suffered — namely negligence, the rule in *Rylands* v. *Fletcher*,[2] and nuisance. One can well understand its being argued that the respondents were negligent in constructing the new bund in the manner in which they did without taking precautions to avoid the escape of some of the liquid discharged from the pipe on to the appellants' land. But this was not the sort of negligence which the judge found to have been established. The relevant passage in his judgment runs as follows:

> "The fault lies with the defendants in not completing the left bund when they knew that the level of water in the reservoir had risen, and in leaving the left bund half completed when they should have known that a heavy rain would cause the water to go over this bund, thus flooding the adjoining area. I therefore hold that the plaintiffs' claim under negligence succeeds."

Although the statement of claim alleges that the respondents were negligent in not completing the bund there was — so far as appears — no suggestion in the evidence that they were guilty of any delay in constructing it nor was it suggested by either side that the flood had been occasioned or contributed to by heavy rains or that any water "went over" the bund. In these circumstances their Lordships do not think that the judge's finding of liability on the ground of negligence can be supported.

Although, as they were reversing the findings of fact made by the trial judge, it was not necessary for them to consider whether if his findings of fact were right the respondents were liable to the appellants under the rule in *Rylands* v. *Fletcher*, the judgment of the Federal Court contains a passage suggesting that the rule should not apply in this case and one of the grounds upon which the Federal Court later gave leave to appeal was so that this question might be considered by the Board. The passage in question runs as follows:

> "Miners have to have water for their circulating system; otherwise it would be extremely difficult or uneconomical for them to extract the ores from the earth. The evidence of the senior inspector of mines would fairly suggest that this is normal mining practice. Were it otherwise mining operations would always be exposed to claims for damages by owners of neighbouring lands. The principle in *Smith* v. *Kenrick* (1849) 7 C.B. 515, I think, was designed to prevent such claims."

Their Lordships would say at once that the case of *Smith* v. *Kenrick* has no application whatever to this case. What *Smith* v. *Kenrick* decided was that if a man conducts mining operations on his own lands in such a way as to cause water naturally on the land to gravitate on to his neighbour's land he will not be liable for any resulting damage. But in this case, the flooding was not due to gravitation but to the failure of the respondents to prevent water which they had accumulated on their land for the purpose of their business from escaping on to the appellants' land. There is, however, one consideration which makes their Lordships hesitate

to base the liability of the respondents to the appellants in this case on the rule in *Rylands* v. *Fletcher*. It is a condition of the application of that rule that the user to which the defendant has put his land is a "non-natural" user. As is pointed out by Professor Newark in his article entitled "Non-Natural User and *Rylands* v. *Fletcher*" (1961) 24 Modern Law Review 557 "non-natural user" is an ambiguous phrase. It may simply indicate that the defendant has artificially introduced on to the land a potentially dangerous substance — and that would appear to be the meaning intended in the earlier cases. But according to the later cases even if the substance has been artificially introduced the user will not be "non-natural" if it is an ordinary use. Thus in *Richards* v. *Lothian*[3] Lord Moulton in giving the judgment of the Board said at page 280.

"It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

and in *Read* v. *Lyons*[4] Lord Porter said at page 176 that non-natural user —

"seems to be a question of fact ... and in deciding this question ... all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to the circumstances."

The application of the rule in *Rylands* v. *Fletcher* to an escape of water accumulated on the defendants' land for the purpose of tin mining was considered by the Malaysian Courts in the case of *Pacific Tin Consolidated Corporation* v. *Hoon Wee Thim*[5] which is referred to in the judgments below in this case. In that case the defendants had their reservoirs above ground level. And Mr. Curtis, the Senior Inspector of Mines, who also gave evidence in this case, said that that was most unusual. In the light of his evidence the courts held that the user of the land in that case was a "non natural" user within the meaning of the rule. But in this case no evidence appears to have been directed to the question whether or not the methods employed by the respondents were in any way unusual and as it is not necessary for the determination of this appeal to decide the point their Lordships would prefer to say nothing which might be said to prejudge the question whether in the light of local conditions the rule in *Rylands* v. *Fletcher* applies to any escape of water accumulated on the miner's land for the purpose of tin mining or only to cases in which the methods employed can be regarded as unusual.

As Lord Simonds pointed out in *Read* v. *Lyons* (at page 183) the rule in *Rylands* v. *Fletcher* is closely connected with the law of nuisance, and in many cases liability can be established indifferently under either head. In this case — leaving the rule aside — their Lordships have no doubt that on the facts found the respondents were guilty of nuisance — that is to say of an unlawful interference with the use or enjoyment by the appellants of their land. As Lord Reid pointed out in giving the judgment of the Board in the *Wagon Mound (No. 2)*[6] at page 639, negligence is not an essential element in determining liability for nuisance. All that is necessary is that the possibility that the use which he was making of his own land might interfere with the use or enjoyment by his neighbour of his land was something which the defendant might reasonably have foreseen. That some of the water which they accumulated on their land for the purpose of their business and which — mixed with sand and mud — they were using to construct the new "bund" — might escape on to the land of the appellants was certainly something which the respondents could have reasonably foreseen as a possibility and even assuming in their favour that they were guilty of no negligence and that the rule in *Rylands* v. *Fletcher* is not applicable they are, their Lordships think, liable in nuisance for any damage resulting from the escape.

The respondents, however, submitted that even if the judge was right in holding that the respondents had infringed the appellants' rights he ought to have awarded only the nominal damages — for which they had admitted that they were liable — and not any sum by way of general damages. In support of this submission they referred to passages in the judgment which — they argued — showed that the judge thought that even though he had dismissed all the claims to "special" damage the law obliged him to presume that the appellants had suffered some general damage — whether or not he considered that in fact they had suffered any damage at all. The language used by the judge in some places does undoubtedly lend colour to this submission — but reading the judgment as a whole their Lordships are satisfied that in awarding the sum of 3,000 dollars by way of general damages the judge was making an estimate of what compensation was fairly due to the appellants for the inconvenience which they could be taken to have suffered through the flooding of a part of their land, including their kiln and the building in which the bricks were stored, with water mixed with mud and sand even though the water quickly subsided and they suffered none of the special damage which they claimed.

Finally the respondents submitted that the judge as he rejected all the claims for special damage ought not to have ordered the respondents to pay to the appellants their whole costs of the action. It is true that a substantial proportion of the evidence given was directed to the issues of special damage, and it would not have been surprising to find that the judge had awarded the respondents the costs of those issues or alternatively in order to avoid a lengthy and expensive taxation had ordered them to pay only some fraction of the appellants' costs. But costs are a matter in the discretion of the judge with the exercise of which an appellate court is most reluctant to interfere. There may have been reasons — for example the fact that the respondents put all the allegations in the statement of claim in issue and only admitted liability for nominal damages at the close of the appellants' case — which caused the judge to direct that notwithstanding the failure of the appellants to prove any special damage the respondents should nevertheless bear the whole costs of the action.

In the result therefore their Lordships will advise the Yang Dipertuan Agung that the appeal be allowed, the judgment of the trial judge be restored and that the respondents pay to the appellants their costs in the Federal Court and of their appeal to the Board.

*Appeal allowed.*

Solicitors: *Wilson Freeman; Stephenson Harwood & Tatham.*